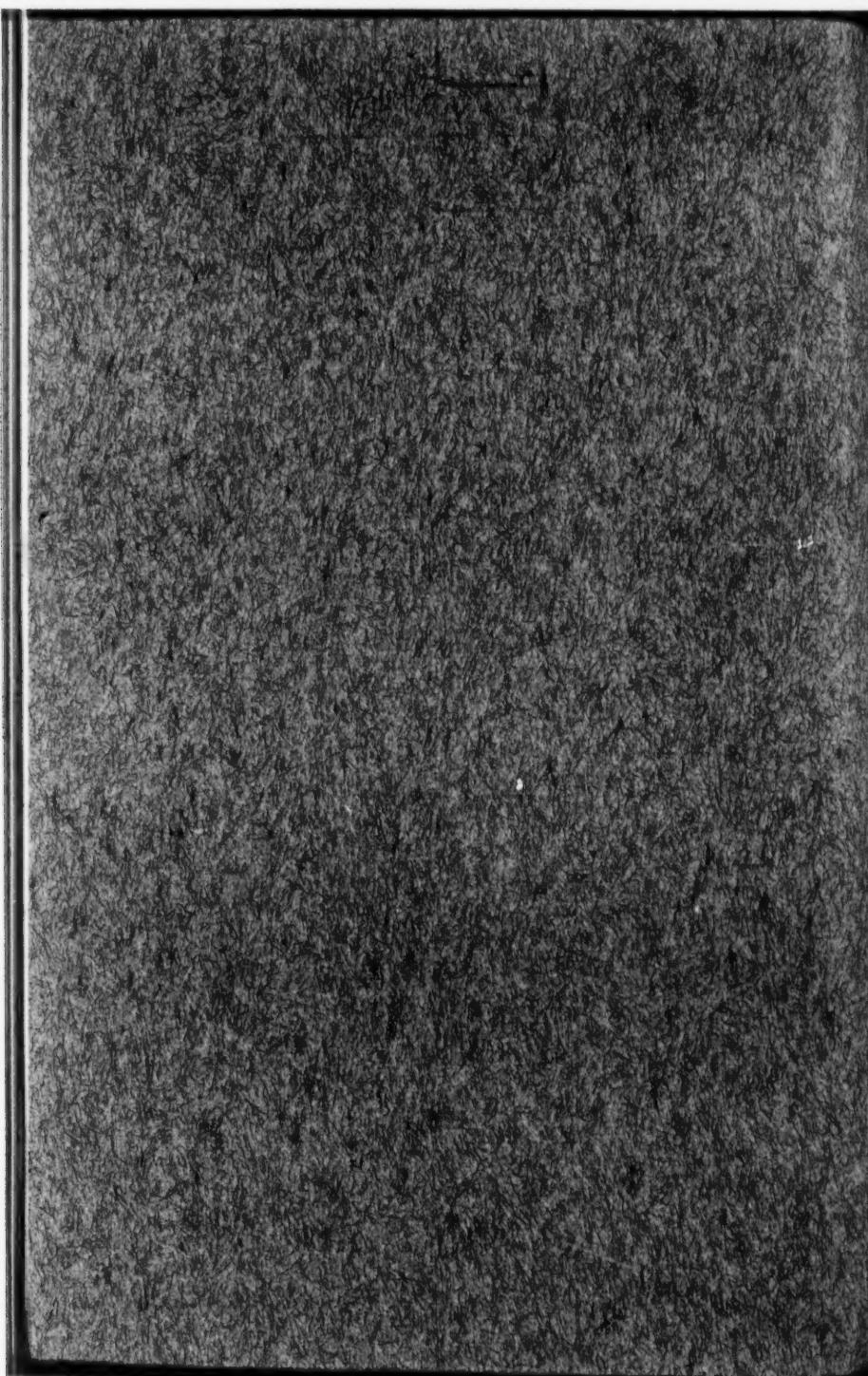


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**In the Supreme Court of the United States.**

October 1991

## ON THE SIGHT



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(1)



# In the Supreme Court of the United States

OCTOBER TERM, 1944

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No. 1027

EDWARD MALLINCKRODT, JR., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinions in the Tax Court (R. 82-119) are reported at 2 T. C. 1128. The opinion of the Circuit Court of Appeals (R. 355-364) is reported at 146 F. 2d 1.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 10, 1945 (R. 364). A petition for rehearing was filed on January 24, 1945 (R. 371), and was denied on January 29, 1945 (R. 373). The petition for a writ of cer-

tiorari was filed on March 9, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

Whether, in view of taxpayer's rights under a trust created by his father, he is taxable, under Section 22 (a) of the Revenue Acts of 1934 and 1936, on the net income of the trust payable to him on request but as to which he made no request.

#### STATUTES INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

##### SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. \* \* \*

Section 22 (a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, is identical with Section 22 (a) of the Revenue Act of 1934 as set out above.

**STATEMENT**

The facts as found by the Tax Court may be summarized as follows:

In 1918, the taxpayer's father created an irrevocable trust naming the taxpayer and the St. Louis Union Trust Company as trustees. The trust was in existence and was being actively administered by the taxpayer and the corporate co-trustee during the years in question. (R.84.)

The trust provided that the income was to be used first to assist in the completion of a building enterprise known as the Arcade Building. Out of any additional income there was to be paid to the taxpayer's wife the sum of \$10,000 a year. The remainder of the trust income was to be paid to the taxpayer upon his request. All of the income which was not requested by the taxpayer was to be accumulated and added to the principal of the trust estate at the end of each year and was to be subject to such further disposition as was provided for the principal. Article Fifth of the trust instrument provided that the trustees, upon written request of the taxpayer during his lifetime, but subject to the approval of both trustees, should pay to the taxpayer such portion of the principal as they might deem wise for his benefit or the benefit of his family. The indenture further gave to the taxpayer a general power of appointment by will over the trust property and provided for gifts over in favor of his wife, chil-

dren, and other descendants in the event of his failure to exercise the power of appointment. It also provided for the termination of the trust during the lifetime of the taxpayer, in the discretion of the trustees, should they decide that such termination would be advisable or desirable in the interest of the Arcade Building enterprise or for any other reason which would be in the interest of the trust estate or the beneficiaries. Upon such termination, the taxpayer was to receive the trust corpus absolutely free of the trust. (R. 84-86.)

The grantor, the taxpayer's father, had, with his two brothers, founded the Mallinckrodt Chemical Works in 1867, and was also one of the founders of the St. Louis Union Trust Company. At the time of the creation of the trust he had already given to his son, the taxpayer, a great deal of property, including a controlling interest in the Chemical Works. At that time the taxpayer had three sons, and his father, in creating the trust, stated that his purpose was to provide for the taxpayer's children and grandchildren. (R. 86-87.)

By the end of 1933, the debts, obligations and burdens with respect to the Arcade Building enterprise had been discharged. Thereafter and during each of the taxable years in question (1934-1937), \$10,000 was paid annually to the taxpayer's wife pursuant to the terms of the

trust. During 1934 and 1935, the taxpayer did not request or receive any of the income of the trust. During 1936, distributions were made at his direction to augment the income of a trust established for his wife and to certain charities. In 1937, an additional distribution was made in augmentation of the trust for his wife. These distributions, which totalled \$19,075.82 in 1936 and \$3,109.14 in 1937, consisted in part of nontaxable income and in part of taxable income but no portion thereof was reported by the taxpayer as taxable income in either year. In the years 1934, 1935, 1936 and 1937 the income of the trust which the taxpayer might have received upon request, but which he did not request and which was therefore added to the principal, consisted of \$438,770.42, \$241,377.25, \$206,801.16 and \$220,317.69, respectively. This income consisted partly of taxable income and partly of nontaxable income. (R. 87-88.)

The Commissioner of Internal Revenue determined that there should be included in the taxpayer's income for the years 1934 through 1937 that portion of the income of the trust (in excess of \$10,000 per annum distributable to his wife) which constituted taxable income (R. 88). The Tax Court, five judges dissenting, sustained the Commissioner's determination (R. 82-119) and its decision was affirmed by the Circuit Court of Appeals (R. 354-364).

**ARGUMENT**

The Commissioner, the Tax Court, and the Circuit Court of Appeals have held that the taxpayer was vested with so many of the substantial attributes of ownership over the trust property and its income, that the income was properly taxable to him under Section 22 (a) of the Revenue Acts of 1934 and 1936, *supra*, p. 2. This conclusion is correct.

The income here involved was the taxpayer's for the mere asking. He had but to request the income in order to receive it in any particular year. Moreover, his right thereto and power thereover does not cease if he refrains from asking for the income in any year. The trust income which the taxpayer does not request for immediate payment is added to the corpus and the taxpayer has a general power of appointment over it. The income which he does not see fit to spend during his lifetime may thus be disposed of by him at his death. The power of appointment is general and unqualified and may be exercised in favor of whomsoever the taxpayer chooses. Furthermore the trustees, of which the taxpayer is one, may distribute to the taxpayer, in their discretion, such portion of the principal, including accumulated income, as the trustees deem wise for his benefit or for the benefit of his family. In addition, if the trustees in their discretion should decide to terminate the trust during the taxpayer's lifetime, the taxpayer would take all

of the trust property, including income and principal, free and clear of any trust. The decision below, holding that the income thus subject to the taxpayer's sweeping command should be taxed to him under Section 22 (a) is therefore well within the scope of *Helvering v. Clifford*, 309 U. S. 331. See also *Harrison v. Schaffner*, 312 U. S. 579, and *Corliss v. Bowers*, 281 U. S. 376. The principle to be followed was thus expressed by this Court in *Corliss v. Bowers, supra* (p. 378):

The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.<sup>1</sup>

The *Clifford* case did not rest, as the taxpayer contends (Pet. 17-18), upon any holding that the trust therein involved was not a real trust but was colorable only. The *Clifford* decision did not deny the reality of the trust therein involved; on the contrary the opinion expressly recognized that valid and subsisting rights had been created in the named beneficiaries by the declaration of trust, but held that nevertheless, because the grantor had retained so many of the substantial incidents of ownership over the trust property, it comported with the realities to tax the income

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<sup>1</sup> "The broad sweep of [the language in Section 22 (a)] indicates the purpose of Congress to use the full measure of its taxing power within [Section 22 (a)'s] definable categories." *Helvering v. Clifford*, 309 U. S. 331, 334.

to him under Section 22 (a). So here, the decisions below do not deny the validity of the trust but hold that the taxpayer should be taxed upon its income (in excess of the \$10,000 per annum which is distributable to his wife) because of his broad dominion and control over it.

The taxpayer seeks to distinguish the situation here involved from that in the *Clifford* case on the ground that the taxpayer here was not, as in the *Clifford* case, the grantor of the trust, but was simply the recipient of the powers vested in him by his father who was the grantor. The distinction is without substance. The determining fact is whether the taxpayer's command and control over the trust income is so nearly akin to ownership that for tax purposes he must be treated as the owner. In determining that issue, the source of the taxpayer's command and control—whether it derives from powers reserved by him in a trust which he has himself created or whether it derives from powers conferred upon him in a trust created by someone else—is entirely irrelevant. Whatever the source of the taxpayer's command, power, or control, if they are such as to give him the substantial attributes of ownership over the trust income, he must be treated as the owner for purposes of taxation. The distinction here urged by the taxpayer has been rejected by the Second Circuit in *Richardson v. Commissioner*, 121 F. 2d 1, certiorari denied, 314 U. S. 684, rehearing denied,

314 U. S. 714, and by the Fifth Circuit in *Jergens v. Commissioner*, 136 F. 2d 497, certiorari denied, 320 U. S. 784, both of which were cases substantially similar to the instant case.

The contention (Pet. 7-14) that Supplement E (Sections 161-169) of the several Revenue Acts since that of 1928 must be applied to the exclusion of Section 22 (a) in the determination of the taxability of trust income is in the teeth of the *Clifford* case. *Helvering v. Wood*, 309 U. S. 344, which was decided on the same day as the *Clifford* case, held that the income from a trust such as was involved in the *Clifford* case was not taxable to the grantor under Section 166, but the *Clifford* case held that nevertheless such income could be taxed to the grantor under Section 22 (a).

*Helvering v. Safe Deposit Co.*, 316 U. S. 56, referred to by petitioner (Pet. 14), was an estate tax case and involved wholly different statutory provisions. Likewise *Sprague v. Commissioner*, 8 B. T. A. 173, is clearly distinguishable. Although it was an income tax case, the *Sprague* case involved only Section 219 of the Revenue Acts of 1918 and 1921, which was the forerunner of Sections 161 and 162 of the Revenue Act of 1928 and later Acts, and did not deal with Section 22 (a). Thus the ruling below is not opposed to the *Sprague* decision, as taxpayer contends (Pet. 16-17), for it holds that the income here involved, although taxable to the taxpayer under Section

22 (a), would not be taxable to him under Sections 161 and 162.

**CONCLUSION**

The decision below is correct and there is no conflict nor any other reason for further review. The petition should therefore be denied.

Respectfully submitted.

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MARCH 1945.